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No. 01-

IN THE
Supreme Court of the United States

AMWAY CORPORATION, RANDY HAUGEN, DEXTER YAGER, SR., RANDY WALKER, AND DONALD R. WILSON,

Petitioners,

v.

THE PROCTER & GAMBLE COMPANY AND THE PROCTER & GAMBLE DISTRIBUTING COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Procter & Gamble sued Amway and several independent distributors of Amway products for allegedly injuring P&G's reputation by repeating an incorrect, decades-old rumor that P&G is associated with Satanism. The court of appeals recognized that P&G is a public figure and that the speech at issue "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." The court nonetheless held that if the speakers' "motives in spreading the Satanism rumor were economic," their speech is "commercial speech," and is therefore entitled to *no* protection under the First Amendment. In light of these holdings, the questions presented are:

1. Whether speech at the core of the First Amendment can be deemed "commercial speech" based on the motivation of the speaker.

2. Whether the "commercial" nature of defamatory speech deprives it of all First Amendment protection, even when the plaintiff is a public figure suing for injury to reputation.

PARTIES TO THE PROCEEDING

Respondents The Procter & Gamble Company and The Procter & Gamble Distributing Company (collectively "Procter & Gamble" or "P&G") were plaintiffs/appellants below.

Petitioners Amway Corporation, Randy Haugen, Randy Walker, Dexter Yager, Sr., and Donald R. Wilson were defendants/appellees below.

WOW International, Inc., Wilson Enterprises, Inc., Freedom Tools, Inc., D&B Yager Enterprises, Inc., Kevin Shinn, Gene Shaw, Birdie Yager, Ronald A. Rummel, Freedom Associates Inc., Walker International Network, and Valerie Haugen were also defendants/appellees below. They are not petitioners in this Court because the district court dismissed the claims against them and those dismissals either were not appealed or were affirmed by the Fifth Circuit.

Pursuant to Rule 29.6, Petitioner Amway Corporation states that it is now known as Alticor, Inc., and is a privately-held corporation that does not have any parent corporations. No publicly-held company owns 10% or more of Amway Corporation's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. The Satanism Rumor 2

B. The Defendant Distributors 3

C. The District Court Proceedings 4

D. The Court of Appeals Decision 5

REASONS FOR GRANTING THE WRIT 6

I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF OTHER COURTS IN HOLDING THAT "THE MOTIVATION OF THE SPEAKER IS DETERMINATIVE" OF WHETHER THE SPEECH IS "COMMERCIAL SPEECH." 6

A. The Fifth Circuit's Decision Highlights the Need for this Court to Reconcile Its Precedents on the Definition of "Commercial Speech." 7

B. The Fifth Circuit's Decision Conflicts with Decisions of Other Courts of Appeals by Relying on Subjective Motivation 8

C. The Fifth Circuit's Decision Subjects Speech at the Core of the First Amendment to Reduced Protection and Discriminates Among Speakers 12

1. The Fifth Circuit Subjected Speech at the Core of the First Amendment to Reduced Protection 13

2. The Fifth Circuit Undermined First Amendment Values by Discriminating Among Speakers 15

II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF OTHER COURTS IN HOLDING THAT "COMMERCIAL" DEFAMATION IS NOT ENTITLED TO PROTECTION 18

A. The Fifth Circuit's Holding Is Inconsistent with this Court's Defamation Precedents. 18

B. The Fifth Circuit's Holding Reflects the Uncertainty Created by this Court's "Commercial Speech" Jurisprudence 22

C. The Fifth Circuit's Holding Conflicts with Decisions of Other Courts 24

D. The Fifth Circuit's Holding Undermines Our Constitutional Commitment to Vigorous Debate on Matters of Public Importance 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases:

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 12,21,22,23

Bad Frog Brewery, Inc. v.
New York State Liquor Auth.,
134 F.3d 87 (2d Cir. 1998) 8

Bartnicki v. Vopper,
121 S. Ct. 1753 (2001) 26

Board of Trustees v. Fox,
492 U.S. 469 (1989).... 8

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) ..... *passim*

Bose Corp. v. Consumers Union of U.S., Inc.,
466 U.S. 485 (1984) 12,16

Buckley v. Valeo,
424 U.S. 1 (1976) 17

Cardtoons, L.C. v.
Major League Baseball Players' Ass'n,
95 F.3d 959 (10th Cir. 1996) 11

Central Hudson Gas & Elec. Corp. v.
Public Serv. Comm'n,
447 U.S. 557 (1980) ..... *passim*

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 9,22

Commodity Trend Serv., Inc. v.
Commodity Futures Trading Comm'n,
149 F.3d 679 (7th Cir. 1998) 9

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) ..... *passim*

Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997) 25

Edenfield v. Fane, 507 U.S. 761 (1993) 20

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council, 485 U.S. 568 (1988) 13

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 11,15

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 13,27

Garcia v. Board of Educ., 777 F.2d 1403 (10th Cir. 1985) 25

Gertz v. Welch, 418 U.S. 323 (1974) 20,26,27

Grayned v. City of Rockford, 408 U.S. 104 (1972) 27

Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) 16,23

Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) 16

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 18,19,20,25

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 15

Lorillard Tobacco Co. v. Reilly,
Nos. 00-596 & 00-597,
2001 WL 721016
(U.S. June 28, 2001) 22,23,26

Moldea v. New York Times Co.,
22 F.3d 310 (D.C. Cir. 1994) 19

NAACP v. Alabama,
357 U.S. 449 (1958) 17

National Life Ins. Co. v. Phillips Publ'g, Inc.,
793 F. Supp. 627 (D. Md. 1992) 24,27

Newcombe v. Adolf Coors Co.,
157 F.3d 686 (9th Cir. 1998) 24

New York Times v. Sullivan,
376 U.S. 254 (1964) ..... *passim*

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 7

Pacific Gas & Elec. Co. v.
Public Utils. Comm'n,
475 U.S. 1 (1986) 14

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 18

Porous Media Corp. v. Pall Corp.,
173 F.3d 1109 (8th Cir. 1999) 25

Procter & Gamble Co. v. Haugen,
222 F.3d 1262 (10th Cir. 2000) 12

Q-Tone Broad. Co. v. MusicRadio of Md., Inc.,
No. 93C-09-021, 1995 WL 875438
(Del. Super. Ct. 1995) 24

Riley v. National Fed'n of the Blind of N.C., Inc.,
487 U.S. 781 (1988) 15

Roe v. Anderson,
134 F.3d 1400 (9th Cir. 1998),
aff'd sub nom. Saenz v. Roe,
526 U.S. 489 (1999) 9

Rosenblatt v. Baer,
383 U.S. 75 (1966) 16

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 26

Semco, Inc. v. Amcast, Inc.,
52 F.3d 108 (6th Cir. 1995) 19

Thomas v. Anchorage Equal Rights Comm'n,
165 F.3d 692 (9th Cir. 1999),
withdrawn and superceded on other grounds,
220 F.3d 1134 (2000) (*en banc*) 9,10

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia,
898 F.2d 914 (3d Cir. 1990) 24

United States v. United Foods, Inc.,
No. 00-276, 2001 WL 703953
(U.S. June 25, 2001) ..... *passim*

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 7,11,15,20

Woods v. Evansville Press Co.,
791 F.2d 480 (7th Cir. 1986) 10,11,24,25

Zauderer v. Office of Disciplinary Counsel of Supreme Court,
471 U.S. 626 (1985) 23

Constitution and Statutes:

U.S. Const. amend. I ..... *passim*

15 U.S.C. § 1125(a) 4,19

18 U.S.C. § 1962 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1332 4

Tex. Bus. & Comm. Code § 16.29 4,19

Other Authorities:

Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807 (1999) 8

Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990) 26

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INTRODUCTION

This petition presents a vital set of issues in First Amendment doctrine. The court of appeals held that speech addressing matters of public concern is entitled to *no* First Amendment protection if the speakers "acted *substantially* out of economic motivation." App. 26a (emphasis in original). That far-reaching holding is inconsistent with the well-considered views of other courts, and bodes ill for First Amendment jurisprudence. As the Fifth Circuit recognized, the speech at issue "touched on the type of issues that are at the heart of First Amendment protections." *Id.* at 21a-22a. By holding that speech at the core of the First Amendment can be deemed "commercial" and thereby deprived of constitutional protection, the court of appeals cut a sizeable hole in that Amendment's protections. This approach, moreover, necessitates an intrusive inquiry into speakers' motives that is wholly inconsistent with the First Amendment. Our system of free expression is designed to *protect* the freedom and privacy of conscience, not *violate* it.

The court of appeals reached its result through two pivotal rulings. The Fifth Circuit first held that the speech at issue is "commercial" if the speakers "acted *substantially* out of economic motivation." App. 26a (emphasis in original). This holding reflects the growing uncertainty and confusion in this Court's jurisprudence regarding the definition of "commercial" speech. That confusion has now led to a square conflict between the circuits, as the Fifth and Seventh Circuits have followed different tests and reached different results in indistinguishable cases.

To compound the First Amendment injury, the court of appeals went on to hold that "commercial" defamation is entitled to *no* constitutional protection, even when, as here, it involves a public figure and a matter of public importance. That conclusion is in conflict with this Court's defamation precedents. The Fifth Circuit's contrary holding stems once again from this Court's wavering jurisprudence on the

constitutional status and treatment of "commercial speech." The court of appeals' ultimate conclusion that "actual malice" protections turn on the motive of the speaker is also in conflict with holdings of the Seventh and Tenth Circuits.

This Court's review is needed to bring clarity and uniformity to this important area of constitutional law.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 242 F.3d 539 and reprinted in the Appendix ("App.") at 3a-55a. The unreported order denying the petition for rehearing and rehearing *en banc* is reprinted at App. 57a-58a. The district court's unpublished judgment is reprinted at App. 1a.

JURISDICTION

The court of appeals entered judgment on February 14, 2001. Petitioners filed timely petitions for rehearing and rehearing *en banc*, which were denied on April 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent portions of the First Amendment to the United States Constitution, the Lanham Act, and the Texas Business and Commerce Code are reprinted at App. 59a-60a.

STATEMENT OF THE CASE

A. The Satanism Rumor

A rumor surfaced in the late 1970s associating P&G with Satanism. A common form of the rumor is that the president of P&G revealed on a national television talk show that he is associated with the Church of Satan, that a substantial portion of P&G's profits is donated to the Church of Satan, and that he saw no harm in making those disclosures because there are no longer enough Christians left in the United States for his admissions to make a difference. *See* App. 4a.

For more than two decades, this well-traveled rumor has, in the words of the Fifth Circuit, "plagued" P&G. App. 4a. It has been chronicled in books, magazines, newspapers, and other media, including the *Wall Street Journal, The New York Times, Newsweek, Time Magazine, USA Today*, CNN, and national television networks. *See* DX 325, 331, 344, 346.[1] P&G "offered no proof that Amway originally started the rumor." App. 5a. To the contrary, the rumor's origin is unknown. *See id.* at 4a-5a; DX 70, 198.

In the early 1980s, P&G initiated a national media campaign in an attempt to refute the rumor. *See* R30/502-04, 31/748; DX 180. As part of that campaign, P&G distributed "truth kits" to the public, instituted litigation, and issued press releases concerning the rumor and associated litigation. *See* R31/674; DX 54, 199, 227, 243. P&G solicited letters from prominent religious figures, established a toll-free hotline, and used its access to the media to orchestrate reports denying the rumor. *See* R31/674; DX 94-95.

P&G's response only fueled the rumor. *See* DX3. Calling P&G's efforts a "bomb," *Advertising Age* opined that the "principal effect" of P&G's efforts was "to increase awareness of the rumors." *Id.* As early as 1986, P&G's public relations firm advised P&G that the rumor would never go away. *See* DX79.

B. The Defendant Distributors

In April 1995, defendant-petitioner Randy Haugen, an independent distributor of Amway products, received a voicemail that repeated a version of the Satanism rumor. Mr. Haugen then forwarded the voicemail – only to other distributors – through a telephone message system known as AMVOX. *See* App. 5a.

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[1] PX and DX refer to plaintiffs' and defendants' exhibits, respectively. Rxx/yy refers to the trial court transcript, volume xx, page yy.

As the Fifth Circuit explained, "[t]here is no evidence that Haugen knew the rumor was false when he spread it; in fact, he testified that he believed it to be true." App. 7a. Days after he sent the voicemail at issue, Mr. Haugen sent a retraction via AMVOX asking the other distributors not to "talk about it anymore" because "[w]e do not think that it happened." *Id.* at 7a & n.4. At Amway's request, he later sent a second, more detailed retraction. *See id.* at 7a.

C. The District Court Proceedings

P&G filed this action against Amway and certain independent distributors asserting that Amway and the distributors damaged P&G's reputational and economic interests by disseminating the rumor. The complaint alleged claims for common-law defamation and violation of three statutes: the Lanham Act, 15 U.S.C. § 1125(a); RICO, 18 U.S.C. § 1962; and Texas Business and Commerce Code section 16.29. *See* App. 10a. P&G also pursued claims for disparagement of Crest toothpaste and alleged operation of a pyramid scheme. *See id.* Jurisdiction was predicated on both diversity of citizenship and the federal questions presented by the Lanham Act and RICO claims. *See* 28 U.S.C. §§ 1331 & 1332.

Following a two-week trial, the district court granted judgment as a matter of law in favor of Amway and the distributors. The court noted that the rumor "started 20 years ago, before Haugen was ever even thought about." R37/2185. The district court also found that the public had engaged in an ongoing discussion of the rumor for decades. *See id.*; DX 3, 32-34, 36-37, 81, 359. P&G did not dispute that point: the former CEO of P&G, John Smale, testified at trial that the rumor was a matter of "public concern" before Haugen repeated it in 1995. R30/372-73, 31/569-70. Accordingly, the court held that the Satanism rumor was a matter of public concern, and that P&G was a limited-purpose public figure concerning the rumor. *See* App. 12a & n.9.

Based on those conclusions, the district court held that P&G could recover for damage to its reputation only if it proved that the distributors had acted with "actual malice" in repeating the rumor, *i.e.*, had done so with knowledge or reckless disregard of its falsity. *See* App. 12a. Because P&G had not presented any evidence of actual malice, the court granted judgment as a matter of law on P&G's Lanham Act claim. *See id.* The court also dismissed P&G's other claims. *See id.*

D. The Court of Appeals Decision

The Fifth Circuit affirmed in part and reversed in part. The court concluded that the Satanism rumor "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. The court also accepted the district court's holding that "P&G is a limited-purpose public figure with regard to the Satanism rumor" because P&G had waived that point on appeal. *Id.* at 31a.

Nonetheless, the court of appeals reversed the district court's judgment on the Lanham Act and Texas Business and Commerce Code claims. *See* App. 52a, 54a. The court first considered whether the speech at issue is "commercial speech" under a balancing test announced by this Court in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *See* App. 24a. With respect to the first *Bolger* factor, which is "whether the speech is an advertisement," the court recognized that "the repetition of the rumor via AmVox was not an advertisement in the classic sense." *Id.* at 25a. The Fifth Circuit held, however, that "whether it could be considered as a negative advertisement against P&G seems to depend on the determination of the third factor – whether the speaker had an economic motivation for the speech." *Id.* The court also held that the second *Bolger* factor, namely, "whether the communication refers to a specific product or service," is satisfied because "the message did refer to specific products of *P&G's*." *Id.* at 24a-25a (emphasis added). After stating that "the speech here does not sort cleanly into either category:

commercial or noncommercial," the Fifth Circuit held that if "the speaker acted *substantially* out of economic motivation," the speech is commercial. *Id.* at 24a, 26a (emphasis in original). Thus, the court remanded for a jury determination on that issue. *See id.* at 25a.

The court of appeals then held that if the speech is commercial, it is entitled to "no protection" under the First Amendment. App. 34a. The court therefore rejected the argument that public figure P&G must prove "actual malice." *Id.* It also considered and rejected the possibility of applying an intermediate level of protection to commercial defamation. *See id.* at 36a-38a. The Fifth Circuit recognized that the arguments in favor of doing so are "compelling," but concluded that it was "prevent[ed]" by this Court's precedents from according any constitutional protection to false commercial speech. *Id.* at 33a, 36a.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF OTHER COURTS IN HOLDING THAT "THE MOTIVATION OF THE SPEAKER IS DETERMINATIVE" OF WHETHER THE SPEECH IS "COMMERCIAL SPEECH."

The court of appeals' holding that speech regarding "issues that are at the heart of First Amendment protections" may be deemed "commercial speech" (and thus subjected to reduced protection) would work a radical transformation of First Amendment jurisprudence. It reflects, however, the uncertainty among the lower courts with respect to the definition of "commercial speech." Especially given the important and recurring nature of this issue, this Court's guidance is needed to bring clarity to this important arena of First Amendment jurisprudence.

A. The Fifth Circuit's Decision Highlights the Need for this Court to Reconcile Its Precedents on the Definition of "Commercial Speech."

This Court has announced at least three different tests for determining whether speech is "commercial." The Court has "usually defined" commercial speech as "speech that does *no more* than propose a commercial transaction." *United States v. United Foods, Inc.*, No. 00-276, 2001 WL 703953, at *3 (U.S. June 25, 2001) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (emphasis added). The Court has deemed the distinction between speech that merely proposes a commercial transaction and other types of speech to be a "commonsense" one. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). This Court employed yet a third test in *Bolger* by considering three factors: whether the communication was an advertisement; whether it referred to a specific product or service; and whether the speaker had an economic motivation for the speech. 463 U.S. at 66-68. The *Bolger* Court indicated that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

This Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use

that definition in either *Bolger* or in [*Board of Trustees v. Fox*, 492 U.S. 469 (1989)] . . . . In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech."

City of Cincinnati v. Discovery Network, 507 U.S. 410, 422-23 (1993) (emphasis in original; citations omitted). The Court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

Lower courts and commentators have expressed frustration with the long-continuing uncertainty. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc., v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that this Court's "attempts to define 'commercial speech'" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 831-32 (1999); *see also* Laurence H. Tribe, *American Constitutional Law* 896 (2d ed. 1988) ("[T]he Court's blithe admonition that the difference between commercial and non-commercial speech is determined by 'commonsense' has not provided reliable guidance for the resolution of individual cases."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 5 (2000) (noting that the "boundaries" of commercial speech are "quite blurred").

B. The Fifth Circuit's Decision Conflicts with Decisions of Other Courts of Appeals by Relying on Subjective Motivation.

This Court's indeterminate precedents have inevitably led to a conflict in the circuits. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of

the *Central Hudson* test," "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does no more than propose a commercial transaction." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998). In doing so, the Seventh Circuit, speaking through now-Chief Judge Flaum, stressed "the incredible breadth of the *Central Hudson* test if taken to its literal extremes," and noted that this Court "has not offered any nuanced distinctions between the two standards." *Id.* at 684. Accordingly, the Seventh Circuit held that speech which "do[es] not propose a commercial transaction between [the speaker] and a specific customer" is "not commercial speech." *Id.* at 686.

Similarly, the Ninth Circuit determined that this Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]." *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). It then limited commercial speech to the traditional test: "This simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia Pharmacy*, 425 U.S. at 762). Although the court later granted *en banc* review, the 11-member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains "persuasive authority" in the Ninth Circuit (though not controlling authority). *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999). *Thomas* also starkly illustrates the difficulty faced by the lower courts in attempting to reconcile this Court's precedents.

In contrast to these cases, the Fifth Circuit decision below employs a loose variant of the *Bolger* test. With respect to the first *Bolger* factor, which is "whether the speech is an advertisement," the court of appeals recognized that "the

repetition of the rumor via AmVox was not an advertisement in the classic sense." App. 25a. The court held, however, that "whether it could be considered as a negative advertisement against P&G seems to depend on the determination of the third factor – whether the speaker had an economic motivation for the speech." *Id.* The court of appeals also held that the second *Bolger* factor – "whether the communication refers to a specific product or service" – is satisfied because "the message did refer to specific products of *P&G's*." *Id.* at 24a-25a (emphasis added). The court then concluded that "if the speaker acted *substantially* out of economic motivation," the speech is commercial. *Id.* at 26a (emphasis in original). The upshot is that speech is commercial if it (1) references a product of a competitor, and (2) has a substantial economic motivation. The Fifth Circuit purported to qualify that holding by stating that other circumstances could be considered, but the court did not identify any such circumstances. *See id.* at 27a.

The Fifth Circuit's *Bolger*-informed analysis cannot be reconciled with the traditional *Virginia Pharmacy* test, as interpreted by the Seventh and Ninth Circuits. As the Fifth Circuit acknowledged, the speech at issue here is "not an advertisement in the classic sense." App. 25a. Mr. Haugen did not "propose a commercial transaction between [the speaker] and a specific customer." *Commodity Trend Service*, 149 F.3d at 686. Nor did he say anything resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Instead, Mr. Haugen spoke about a competitor's religious affiliation, in an "intracorporate" setting, without mentioning any specific Amway products or offering any prices or terms of sale. By holding that such speech is "commercial" if undertaken for profit, the court of appeals ruled in conflict with the much narrower interpretations of the Seventh and Ninth Circuits.

The Seventh Circuit's decision in *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986), puts this conflict in bold relief. In *Woods*, a television station owner sued a newspaper for defaming him, in part by "misrepresenting his religious

beliefs." *Id.* at 483. The plaintiff argued that the defendants' speech was "commercial speech" because he was "a competitor of the Defendants and much of what the Defendants published concerns the Plaintiff's competitive posture." *Id.* at 483-84 (internal quotation omitted). The Seventh Circuit disagreed, and held that the speech "simply cannot be characterized as commercial speech" because it "clearly is not advertising by any stretch of the imagination." *Id.* at 484. The court also stressed that it is "immaterial" whether "the defendants may have profited" from the speech. *Id.* at 484.

The Seventh Circuit's holding cannot be reconciled with the decision below. Under the Fifth Circuit's analysis, the speech at issue in *Woods* is "not an advertisement in a classic sense," but "could be considered as a negative advertisement against" the competitor. App. 25a. The speech also "refer[red] to specific products" of the speaker's competitor (its news broadcasts). *Id.* No other circumstances distinguish the cases, since it has long been settled that individuals like Mr. Haugen enjoy the same First Amendment protections as the news media. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Thus, under the Fifth Circuit's test, the Seventh Circuit should have remanded for factfinding on motive. Instead – and in conflict with the Fifth Circuit's current methodology – the Seventh Circuit eschewed any consideration of motive, employed the traditional *Virginia Pharmacy* test, and held that the speech is not commercial as a matter of law.[2]

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[2] This conflict is present not only among the circuits, but also within the Tenth Circuit. One Tenth Circuit panel held that "commercial speech is best understood as speech that *merely advertises* a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (emphasis added). Because the speech at issue in that case did not "merely advertise" a product, it was "not transformed into commercial speech merely because [it was] sold for profit." *Id.* Without citing *Cardtoons*, however, a different panel later used the

(continued...)

C. The Fifth Circuit's Decision Subjects Speech at the Core of the First Amendment to Reduced Protection and Discriminates Among Speakers.

Beyond the need to resolve the circuit conflict and reconcile this Court's precedents, this case presents important First Amendment issues that cry out for review in their own right. "Commercial speech" jurisprudence has typically focused on advertising, not on speech that could be called "commercial" in a broader sense. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495-500 (1996) (plurality opinion). Not even all advertising is "commercial speech." *See Bolger*, 463 U.S. at 66 ("The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech."). By focusing on the speaker's motivation, the Fifth Circuit expanded the "commercial speech" doctrine far beyond its advertising moorings.

In First Amendment cases, this Court has a unique "role in marking out the limits of the [constitutional] standard through the process of case-by-case adjudication." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984). Especially when lower courts have held speech to be completely unprotected by the First Amendment, the Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

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[2] (...continued)
Bolger test to hold that Mr. Haugen's voicemail is "commercial speech" (albeit based in part on the conclusion that arguments raised in this case were not preserved in that case). *See Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1274-75 (10th Cir. 2000). This intracircuit inconsistency on the test for determining whether speech is "commercial" further confirms the need for this Court's guidance.

The need for this Court to review decisions restricting core First Amendment freedoms is especially exigent in light of the increasingly nationwide nature of speech. National and multinational companies routinely distribute information on a nationwide or international basis. Thus, they are effectively bound by the law of the least-protective circuit. If the Fifth Circuit punishes speech, nationwide speakers are precluded, as a practical matter, from disseminating it at all. Perhaps for that reason, this Court has previously granted *certiorari* in commercial speech cases based solely on the importance of the issues presented. *See, e.g., Discovery Network*, 507 U.S. at 415-16; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 574, 576 (1988). The issues presented here are especially important. The court of appeals subjected speech on a religious topic to reduced protection, and discriminated among speakers based on an intrusive inquiry into their subjective motivations.

1. The Fifth Circuit Subjected Speech at the Core of the First Amendment to Reduced Protection.

By classifying speech at the core of the First Amendment as "commercial speech," the court of appeals undermined vital First Amendment values. Commercial speech has generally received less protection than other speech because it "has been thought less valuable than" other types of speech. App. 18a. In light of this rationale, this Court has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Otherwise, core political speech could be deemed "commercial" and relegated to the less searching scrutiny reserved for "less important" speech.

That is exactly what the Fifth Circuit did here. The court of appeals recognized that the speech at issue "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. Yet it held that the speech could be deemed commercial. The court attempted to

rationalize that counterintuitive result by quoting *Bolger* for the proposition that "*advertising* which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 34a (emphasis added). But that point begs the question whether the communication is an advertisement in the first place. In *Bolger*, a prophylactic manufacturer sent out pamphlets extolling the virtues of condoms in preventing disease. *See* 463 U.S. at 66 n.13. The Court explained that simply because "a product is referred to generically does not . . . remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names." *Id.*

In this case, Mr. Haugen's voicemail did not promote Amway's products by reference to their virtues. Nor did it say that P&G's products were of inferior quality. Instead, Mr. Haugen forwarded a voicemail, which focused on P&G's relationship with Satanism, to other distributors. The motivation behind such speech has no bearing on its importance. If a defense contractor thinks that another contractor is selling weapons to the enemy, people ought to know. If a company thinks that another company is supporting the Klu Klux Klan or the Communist Party or a terrorist organization or the Church of Satan, people ought to know. Here, Mr. Haugen forwarded the voicemail only to other distributors. Yet the Fifth Circuit would deprive his speech of First Amendment protection.

That is not the intent of the "commercial speech" doctrine, which has "usually" been held to target "speech that does *no more* than propose a commercial transaction." *United Foods*, 2001 WL 703953, at *3 (emphasis added). Thus, this Court held that a newsletter issued by a corporation was not "commercial speech" because it "extend[ed] well beyond speech that proposes a business transaction." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9

(1986) (plurality opinion). Similarly, charitable solicitations are not "commercial speech" because the charitable message and the request for funds are "inextricably intertwined." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *accord Virginia Pharmacy*, 425 U.S. at 761. So too here, the voicemail does much "more than propose a commercial transaction." *United Foods*, 2001 WL 703953, at *3. In view of the "intracorporate" nature of the communication, it can hardly be said to propose a transaction at all.[3]

2. The Fifth Circuit Undermined First Amendment Values by Discriminating Among Speakers.

The Fifth Circuit compounded the First Amendment injury by placing "determinative" reliance on the speaker's motive. App. 24a, 27a. That holding is both inconsistent with this Court's precedents and affirmatively harmful to First Amendment values.

This Court has repeatedly explained that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). "That books, newspapers and magazines are . . . sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *see also New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the [defamatory] advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."). Indeed, "[i]f a profit motive could somehow strip

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[3] Similarly, fliers that were separately disseminated by other independent distributors, none of whom are defendants in this case, asked readers to "[i]nform other Christians about this. Stop buying Procter & Gamble products and let's show the President of Procter & Gamble that there are far [sic] enough Christians to make a difference." PX1537A. Thus, the fliers closely resemble consumer boycotts and charitable solicitations.

communications of the otherwise available constitutional protection, [this Court's] cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667 (1989). Thus, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-194 (1999).

By departing from those principles, the Fifth Circuit would substantially diminish First Amendment protections. Instructing juries on which speech is worthy of protection "has not, in and of itself . . . served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose*, 466 U.S. at 505. Accordingly, this Court has stressed the need to prevent juries from nullifying the First Amendment protections of unpopular speakers. *See, e.g., id.* at 505-511; *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966). Under the decision below, however, First Amendment freedoms would be subject to a jury's assessment of the speaker's motives. The result is an open invitation to eviscerate First Amendment protections precisely when they are most needed – when the speech is unpopular.

The court of appeals itself illustrated the arbitrariness of its speaker-based approach. In particular, the court said that an owner of a religious bookstore who described rock music as being influenced by the devil would be protected if she had a "primarily religious, rather than economic, motivation for her speech." App. 26a n.28. But if she is "agnostic and opened the bookstore only after a case study . . . showed that Christian bookstores can be extremely profitable," then her speech would likely be commercial. *Id.* In either event, however, her message would have exactly the same value to public discourse. It makes no sense for First Amendment protections to turn on her subjective motives, especially since doing so would enable a potentially hostile jury to punish her for that reason alone.

Consider the speech in this very case. If a minister quoted the voicemail from the pulpit, his speech would obviously be religious in nature. But if he were a part-time distributor of Amway products, the Fifth Circuit would subject him to cross-examination as to his motives. Similarly, individuals who organize consumer boycotts address important political issues. But if a jury found that they acted out of economic motivations, they could be sent to jail. If the original owners of Ben & Jerry's gave their employees a pep talk by describing the evils of their capitalist competitors, they would be subject to suit under the "commercial speech" doctrine. A news station that gave a negative review to a musician might also be sued if its parent corporation owned a competing recording studio. The Fifth Circuit appeared to recognize this problem, for it stated in an unsupported footnote that similar speech by unions might not be "commercial." *See* App. 27a n.30. But it did not (and could not) provide any principled basis for distinguishing that situation from this one.

The court of appeals' reliance on subjective motivation is also perverse, because it requires a speaker to endure an intrusive invasion of his freedom of conscience in order to invoke the First Amendment. That Amendment is supposed to vindicate the freedom of conscience, not violate it. Compelled disclosures of political contributions and organizational membership lists are subjected to "[e]xacting scrutiny" precisely because such "invasion of privacy of belief" runs afoul of First Amendment values. *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976); *see also, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958). Yet the Fifth Circuit would require precisely that invasion as the price for invoking the First Amendment. The Amendment would be turned against itself.

II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF OTHER COURTS IN HOLDING THAT "COMMERCIAL" DEFAMATION IS NOT ENTITLED TO PROTECTION.

If the speech at issue is "commercial," the next question is whether that status renders the speech less deserving than other defamatory speech of constitutional protection. This Court has long held that the applicable level of protection turns on whether the plaintiff is a public official or public figure, and whether the speech addresses a matter of public concern. The Fifth Circuit would now ignore that test and subject "commercial" defamatory speech to strict liability. That holding is in conflict with this Court's defamation precedents. It again reflects, however, the lingering uncertainty caused by this Court's precedents on the level of protection accorded to "commercial" speech.

A. The Fifth Circuit's Holding Is Inconsistent with this Court's Defamation Precedents.

This Court has "consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (quoting *New York Times*, 376 U.S. at 279-80). Further, the Court has confirmed that this holding applies to all communications on a matter of public concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion). These precedents control this case for three reasons.

First, there is no question that P&G is a limited-purpose public figure with respect to the Satanism rumor. P&G aggressively asserted itself into the controversy by launching a media campaign against the rumor – an effort that backfired and actually fanned the rumor. *See* page 3, above. The district

court accordingly concluded that P&G is a limited-purpose public figure in this respect, and the court of appeals held that P&G is bound by that determination. *See* App. 30a-31a.

Second, there can be no doubt that the communication concerns matters of public concern. As the Fifth Circuit explained, the speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." App. 21a-22a. Because of its importance, the rumor was widely disseminated more than a decade before Mr. Haugen forwarded the voicemail. *See id.* at 4a-5a.

Third, there is no question that P&G is seeking to hold Amway and certain distributors liable for damage to its reputation caused by the Satanism rumor. This Court has stressed that a plaintiff cannot circumvent *New York Times* by suing for damage to reputation under a cause of action other than state-law defamation. *See Hustler*, 485 U.S. at 56-57. In this case, P&G sued under state defamation law; the Lanham Act, 15 U.S.C. § 1125(a), which provides a cause of action for "commercial defamation," *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 111 (6th Cir. 1995); and section 16.29 of the Texas Business and Commerce Code, which authorizes suit to protect the plaintiff's "business reputation." P&G did not appeal the dismissal of its state-law defamation claim, but now seeks to recover the same damages under the federal and state statutes. That is precisely what *Hustler* prohibits. *See, e.g.*, *Moldea v. New York Times Co.*, 22 F.3d 310, 319 (D.C. Cir. 1994).

Given that all of the criteria for application of the "actual malice" standard are satisfied, the Fifth Circuit's "commercial speech" distinction is no distinction at all. In *Dun & Bradstreet*, this Court faced the question whether economic speech about a public figure was entitled to reduced protection. A plurality of the Court explained that "speech on matters of public concern . . . is at the heart of the First Amendment's protection." 472 U.S. at 758-59 (internal quotations omitted). Thus, the Court held that whether speech is entitled to full

protection under *New York Times* turns on whether it addresses "matters of public concern" or "matters of purely private concern." *Id.* In dissent, four Justices stressed that speech on a matter of public concern should not receive reduced protection merely because it is "commercial." *Id.* at 794 (Brennan, J., dissenting). The plurality appeared to agree by clarifying that it did "not hold . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech," but instead held it to reduced protection inasmuch as it did not address a matter of public concern. *See id.* at 762 n.8. Because the speech at issue involves "matters of public concern," it "is at the heart of the First Amendment's protection" under *Dun & Bradstreet*. *Id.* at 758-59. Thus, it is irrelevant whether the speech is also "commercial."

This conclusion is only confirmed by the Fifth Circuit's analysis. The court of appeals noted that false commercial speech has no constitutional value. *See* App. 19a. But commercial speech is no different than other speech in that respect. This Court's defamation jurisprudence has long recognized that *all* "[f]alse statements of fact are particularly valueless." *Hustler*, 485 U.S. at 52. Nonetheless, such falsehoods are protected, not for their own sake, but because they are "inevitable in free debate." *Id.* (internal quotation omitted). "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Welch*, 418 U.S. 323, 341 (1974).

That rationale applies with full force to commercial speech, because it is well-settled that truthful commercial speech has constitutional value, and should therefore be encouraged. *See, e.g., Virginia Pharmacy*, 425 U.S. at 763-64. Commercial speech, like speech on other matters of public concern, contributes to the marketplace of ideas and not simply the market for goods. *See United Foods*, 2001 WL 703953, at *3; *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life,

provides a forum where ideas and information flourish."). Indeed,

> [a]dvertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market.... [C]ommercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

44 Liquormart, 517 U.S. at 495.

As Second Circuit Judge Robert D. Sack summarized in his treatise:

> [T]here is growing recognition by the Supreme Court of the constitutional value of truthful and nonmisleading commercial speech; there is potentially greater chilling effect on such speech from common-law remedies than from direct governmental regulations of commercial speech; and commercial speech has special attributes that make the state interest in protecting plaintiffs against inaccurate speech arguably *less* important in the commercial context. There is therefore no basis for departing from traditional First Amendment analysis in considering commercial defamation claims, and the "actual malice" standard should apply in commercial libel cases in the same manner and under the same circumstances as it applies in cases involving noncommercial speech.

Robert D. Sack & Cameron DeVore, *Advertising and Commercial Speech: A First Amendment Guide* §7:2.1 (1999); *accord* John Charles Ulin, Comment, *First Amendment Crossroads – Extending Constitutional Defamation Protection to Commercial Speech*, 39 U.C.L.A. L. Rev. 633, 673-689 (1992).

B. The Fifth Circuit's Holding Reflects the Uncertainty Created by this Court's "Commercial Speech" Jurisprudence.

The court of appeals' contrary holding reflects the deepening confusion spawned by this Court's "commercial speech" jurisprudence. In Section I.A, above, we addressed the uncertainty that has resulted from this Court's use of multiple tests for determining whether speech is "commercial." The Court has also "followed an uncertain course" in determining what level of protection to accord speech that it has determined to be commercial. *Lorillard Tobacco Co. v. Reilly*, Nos. 00-596 & 00-597, 2001 WL 721016, at *32 (U.S. June 28, 2001) (Thomas, J., concurring in part and in judgment). In some cases, this Court has held, consistent with *Dun & Bradstreet*, that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501; *see also, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and noncommercial speech"). But in other cases (and especially in older cases) this Court has held the "commercial speech" label dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

This Court's most recent precedents have only added to the uncertainty. In *United Foods*, this Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 2001 WL 703953, at *3 (citing opinions of Stevens and Thomas, J.J.). But the Court concluded that it "need not enter into the controversy" because the restriction at issue could not be upheld under any standard. *Id.* In *Lorillard*, the Court recognized that a *majority* of the Justices have criticized *Central Hudson*, but again concluded that the traditional test sufficed for purposes of that case:

> Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. *See, e.g.*, [*Greater New Orleans*, 527 U.S. at 197] (Thomas, J., concurring in judgment); [*44 Liquormart*, 517 U.S. at 501, 510-514] (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

2001 WL 721016, at *19; *see also id.* at *30 (Kennedy, J., joined by Scalia, J., concurring in part and in judgment) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it"); *id.* at *32 (Thomas, J., concurring in part and in judgment) ("there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

The instability in this Court's wavering jurisprudence may account for the Fifth Circuit's departure from the *New York Times* line of cases. The court of appeals agreed that there is a "compelling" argument that commercial defamation deserves at least some constitutional protection. App. 36a. The court concluded, however, that "*Central Hudson, Bolger, and Zauderer [v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985)], combined with the Court's plain statements that false commercial speech receives no protection, foreclose us from importing the actual-malice standard from defamation into the law of false commercial speech." *Id.* at 34a-35a (footnote omitted).

The court of appeals got it backwards. As explained in Section A, above, this is a defamation case controlled by the

"actual malice" standard of *New York Times* and *Dun & Bradstreet*. It was the Fifth Circuit that "import[ed]" inapposite commercial speech principles into the law of defamation. Each of the three cases cited by the court of appeals addressed a government restriction on *advertising*; none of them addressed a private civil lawsuit based on *defamation*, and therefore none of them "forelose[d]" the court from applying this Court's controlling defamation precedents.

C. The Fifth Circuit's Holding Conflicts with Decisions of Other Courts.

The Fifth Circuit's misapprehension of this Court's commercial speech jurisprudence brought it into conflict with decisions of other courts. At least two courts have squarely rejected the "novel argument that a plaintiff need not demonstrate that a defendant acted with malice when a defendant's statement is contained in commercial speech." *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. at 645; *see also Q-Tone Broad. Co. v. MusicRadio of Md., Inc.*, No. 93C-09-021, 1995 WL 875438 (Del. Super. 1995). Similarly, the Ninth Circuit has assumed that the *New York Times* standard applies equally to "commercial speech" and other speech. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694 n.4 (9th Cir. 1998) (discussing the "actual malice" test in the context of pure advertising).[4]

The combination of the Fifth Circuit's two holdings also conflicts with decisions of other courts of appeals. The Seventh Circuit held in *Woods*, before considering whether the speech was commercial, that "it is immaterial to the application of the qualified constitutional privilege [of actual malice] that the

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[4] In contrast, the Third Circuit has held, based on "the novel facts" of the case before it, that the "actual malice" standard was inapplicable because the speech was commercial. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 931-32 (3d Cir. 1990). In that case, however, the plaintiff was not a limited-purpose public figure, *see id.* at 938-39, and the speech at issue was a "comparative advertising war." *Id.* at 917.

defendants may have profited from the publication at issue." 791 F.2d at 484. The Tenth Circuit has likewise held that "[t]he focus of the analysis, in determining whether actual malice is required, must be on the subject of the speech, not on the identity of the speaker." *Garcia v. Board of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985). While *Garcia* arose in a different context (the question in that case was whether nonmedia defendants are entitled to the same protections as media defendants), the court's ultimate conclusion that "the identity of the speaker" is irrelevant, *id.*, cannot be reconciled with the Fifth Circuit's focus on the identity and subjective motivation of the speaker. Similarly, the Eighth and Ninth Circuits have applied the *New York Times* test to Lanham Act claims brought against defendants who stood to gain financially from the allegedly defamatory speech. *See Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119 (8th Cir. 1999) (holding that plaintiff who brought claim against competitor based on false advertising was not a limited-purpose public figure); *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251 (9th Cir. 1997) (holding that "public figure" could recover from tabloid "only by proving 'actual malice'"). By holding that the applicability of the "actual malice" protection turns on the identity and subjective motivation of the speaker, rather than on whether the speech involves a matter of public concern regarding a public figure, the Fifth Circuit's decision conflicted with the holdings of the Seventh and Tenth Circuits and the analyses of the Eighth and Ninth Circuits.

D. The Fifth Circuit's Holding Undermines Our Constitutional Commitment to Vigorous Debate on Matters of Public Importance.

The importance of "actual malice" protections alone warrants *certiorari*. In both *New York Times* and *Hustler*, this Court granted *certiorari* "[b]ecause of the importance of the constitutional issues involved." *New York Times*, 376 U.S. at 264; *see also Hustler*, 485 U.S. at 50. The same constitutional values are at stake in this case.

This Court recently reaffirmed "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'" *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1765 (2001) (quoting *New York Times*, 376 U.S. at 270). This commitment is based on the principle that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *New York Times*, 376 U.S. at 270 (internal quotation omitted). Yet the Fifth Circuit would depart from this principle whenever speech is found to be "commercial."

That conclusion leaves First Amendment freedoms hanging by far too slender a thread. No matter which test is used to determine whether speech is "commercial," this Court has noted that the inquiry is at best "a matter of degree." *Discovery Network*, 507 U.S. at 423. Justice Thomas was more blunt: "I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*, 2001 WL 721016, at *32 (Thomas, J., concurring in part and in judgment); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (commenting on the "artificiality of a rigid commercial/non-commercial distinction"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) ("the commercial/noncommercial distinction makes no sense"). In this very case, the Fifth Circuit candidly opined that "the speech here does not sort cleanly into either category: commercial or noncommercial." App. 24a.

Under the Fifth Circuit's holding, however, a distinction that is at best a minor difference in degree turns into a major difference in kind. If speech is not commercial, it is entitled to full First Amendment protection. But if it is commercial, it is entitled to *no* protection at all. Even in the context of speech regarding *private* matters, this Court has not permitted such a sharp disparity in treatment. Instead, speech on private matters regarding public figures is entitled to an intermediate level of protection between "actual malice" and strict liability. *See*

Gertz, 418 U.S. at 347. The Fifth Circuit, in contrast, would accord *no* protection to speech regarding matters of *public* importance and *public* figures if the speech is also commercial. As the *National Life* court stressed, "[i]n using the mere identification of commercial speech as the analytic tool, Plaintiff operates with a meat cleaver instead of a scalpel, and would amputate much of the core of protected speech from the body of the First Amendment." 793 F. Supp. at 646.

This point is especially pronounced in light of the Fifth Circuit's expansive definition of commercial speech. When that court's two holdings are combined, speech at the *core* of the First Amendment can be deemed "commercial" based on the speaker's motivation, and then deprived of all First Amendment protection for that reason alone. This result makes no sense, given that "what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker." *Florida Bar*, 515 U.S. at 636-37 (1995) (Kennedy, J., joined by Stevens, Souter, and Ginsburg, J.J., dissenting). *New York Times* itself involved a paid advertisement that was placed in part for financial reasons – the solicitation of funds. *See* 376 U.S. at 256-57. Nonetheless, the advertisement was core political speech that hardly warranted lesser treatment based on its financial motivation.

In combination, the court of appeals' holdings would also mean that many speakers who stood to profit from their speech could not accurately predict whether a judge or jury would later conclude that they deserved First Amendment protection. Such uncertainty would "inhibit the exercise of [First Amendment] freedoms" by "inevitably lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation omitted). By doing so, it would undermine our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times*, 376 U.S. at 270.

The Fifth Circuit recognized the force of these points, but felt bound by this Court's commercial speech jurisprudence. *See* App. 33a-34a. This Court's guidance is therefore needed on this important First Amendment issue.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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